

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

6 EDGARDO RODRIGUEZ,
7 Petitioner,
8 vs.
9 KIM HOLLAND, Warden,
10 Respondent.

Case No: C 11-00935 SBA

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

12 Petitioner Edgardo Rodriguez was convicted following a jury trial in the Alameda
13 County Superior Court of first degree murder and weapons charges, and sentenced to life in
14 prison without the possibility of parole. Through counsel, Petitioner has filed a petition for
15 a writ of habeas corpus under 28 U.S.C. § 2254. Having read and considered the papers
16 submitted, and being fully informed, the Court DENIES the petition.

17 | I. BACKGROUND

A. STATEMENT OF THE CASE

19 Petitioner and co-defendants Bryan Giddings (“Giddings”), Manuel Robles
20 (“Robles”), and Omar Anwar (“Anwar”), were charged with the shootings of Francisco
21 Javier Sanchez (“Sanchez”) and Osvaldo Ramirez (“Ramirez”). Ramirez survived, but
22 Sanchez did not. After initially pleading not guilty, Giddings, Robles, and Anwar entered
23 pleas of no contest or guilty to aiding and abetting an assault by defendant with a
24 semiautomatic firearm in violation of Penal Code § 245(b), which the prosecution specified
25 was a “stipulated lesser-related” offense to the charged offense of shooting at an occupied
26 motor vehicle. People v. Rodriguez, No. A114910, 2009 WL 2993822, *1 (Cal. Ct App.
27 Sept. 21, 2009) (unpublished disposition).

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1 The California Court of Appeal summarized the case against Petitioner, as follows:

2 **1. The Shooting**

3 On the afternoon of September 16, 2003, Sanchez was driving
4 his brother's red or maroon car on Mission Boulevard in
5 Hayward, with his friend Ramirez seated in the front passenger
6 seat. Sanchez and Ramirez, who were members of the Laborers
7 Union, had just paid their union dues at a union hall on Mission
8 and were driving toward a supermarket. Sanchez and Ramirez
9 were not involved in gang activity. Sanchez stopped at a red
10 light at the intersection of Mission and Industrial. A white
11 minivan stopped in the left turn lane next to the driver's side of
12 Sanchez's car. Ramirez later identified a photograph of Bryan
13 Giddings's white minivan as the van that stopped next to
14 Sanchez's car. Ramirez testified that a man got out of the back
15 of the van and reached his hand into the driver's side window of
16 Sanchez's car. Ramirez then heard several gunshots. After the
17 first shot, Ramirez felt pain in his leg and ducked down.
18 Sanchez's car rolled forward into the intersection and came to a
19 stop. When Ramirez looked up, he saw that Sanchez was
20 bleeding and had several wounds, including a head wound.
21 Sanchez died of bullet wounds to his head, left shoulder, and
22 right forearm.

23 Stephanie Koller and her teenage son Kyle were driving on
24 Mission and stopped at the intersection of Industrial at about 3
25 p.m. on September 16, 2003, in the same southbound lane as
26 Sanchez's car, and two cars behind it. Stephanie saw the white
27 minivan pass her car and stop in the left turn lane next to
28 Sanchez's car. Stephanie then saw a man get out of the van,
approach Sanchez's car, and throw two punches at the driver
through the open driver's side window. Kyle also saw the man
standing in the street between the white minivan and the
maroon car. Kyle then saw a man's right hand and arm come
out of the open front passenger's side window of the white
minivan, holding a gun that Kyle recognized as a semiautomatic
weapon. The man holding the gun pointed it at the driver's side
of the maroon car and fired six or seven shots. Stephanie also
heard several gunshots. Based on the skin color of the shooter's
arm, Kyle believed the shooter was Hispanic. Kyle believed that
the man holding the gun out of the window was not the driver
of the van, because the driver would not be able to lean over far
enough to stick his forearm out of the passenger side window.

29 Kyle and Stephanie testified that, when the gunshots began, the
30 man standing in the street between the van and Sanchez's car
31 appeared to be startled by the shots. The man in the street
32 jumped back, put his hands in front of his face and turned his
33 head as if he were trying to get out of the way. When the
34 shooting stopped, the white van began making a U-turn on
35 Mission, stopped briefly to let the man in the street run to get
36 into the van, and then continued the U-turn and drove away
37 northbound on Mission. When the van stopped in the middle of
38 its U-turn to let the man in the street get in, Kyle and Stephanie
39 saw the driver of the van. Kyle also noticed the first digit of the

1 van's license plate number. Stephanie called her husband, a
 2 Hayward police officer, and gave descriptions of the driver of
 3 the van and the man who got out of the van and threw punches
 4 at Sanchez. At trial, Stephanie and Kyle both identified
 5 Giddings's white minivan as the van involved in the shooting.

6 The parties stipulated that Ranil Bhukhan, if called as a witness,
 7 would testify that he was driving on Mission at the intersection
 8 of Industrial on September 16, 2003, at approximately 3 p.m.,
 9 witnessed a shooting, saw a white van make a U-turn, and wrote
 10 down the van's license plate number on a paper bag. The
 11 number Bhukhan wrote down was the license plate number of
 12 Giddings's van.

13 Giddings, Robles, and Anwar testified that, on September 16,
 14 2003, they were gang members. Giddings was involved with the
 15 VSH (Vario South Hayward) and DGF (Don't Give a Fuck)
 16 gangs, which are affiliated with the South Side Hayward gang,
 17 which in turn is a Norteño gang. Robles and Anwar were DGF
 18 gang members. Giddings, Robles, and Anwar testified that
 19 defendant was also a DGF gang member on September 16,
 20 2003. Members of Norteño gangs such as South Side Hayward
 21 and DGF view Sureño gangs as their enemies and will attack
 22 persons they believe to be Sureño gang members. Norteño gang
 23 members use the derogatory term "Scraps" to refer to Sureño
 24 gang members.

25 On September 16, 2003, Giddings drove his white minivan,
 26 with defendant seated in the front passenger seat, to pick up
 27 Robles. Robles testified that, when Giddings and defendant
 28 picked him up at his mother's home, Giddings was driving,
 defendant was seated in the front passenger seat, and Robles got
 into the back seat.

29 Robles's sister, Anna Robles Ramirez (Anna), testified that at
 30 around 2:30 p.m. on September 16, 2003, Giddings and
 31 defendant arrived at Anna's mother's home (where Anna was
 32 then living) in Giddings's van. Anna saw Robles get into the
 33 rear sliding door of the van and, as the van pulled away, she
 34 saw that Giddings was driving and defendant was seated in the
 35 front passenger seat.

36 Giddings next drove the van to an area called Ranker Court and
 37 picked up Anwar, who got into the back seat of the van. The
 38 group drove around for a while listening to music, drinking
 39 beer, and smoking marijuana, and then arrived at the
 40 intersection of Mission and Industrial. During the drive, the
 41 group talked about problems they had been having recently with
 42 "Scraps" and spoke about wanting to beat up or "smash" a
 43 "Scrap." Giddings testified that, during this conversation,
 44 defendant said "I want to get me a Scrap." Giddings testified
 45 that, prior to arriving at Mission and Industrial, he was not
 46 aware that anyone in the van had a gun, although he always
 47 assumed it was possible that one of his fellow gang members
 48 might have a gun. Anwar testified that he was not aware that
 defendant had a gun before the van arrived at Mission and

1 Industrial. Robles had seen a gun in defendant's pocket earlier
2 in the day.

3 The three codefendants all testified that, when the van arrived at
4 Mission and Industrial, Giddings was driving, defendant was in
5 the front passenger seat, Robles was in the back seat behind
6 Giddings, and Anwar was in the back seat behind defendant.
7 Giddings stopped at the red light in the lane to the left of the
maroon car driven by Sanchez. The occupants of the van
noticed that there were two young Hispanic men in the car and
that the driver (Sanchez) was wearing a baby blue University of
North Carolina baseball cap. Sureños claim the color blue, and
Norteños claim the color red.

8 Giddings and Anwar testified that defendant said "There goes a
9 Scrap" or something similar. Defendant told Anwar to get out
10 of the van and confront or punch the driver of the maroon car.
11 Anwar testified that when defendant told him to get out of the
12 van, defendant had taken out a gun and was waving it at Anwar.
13 Giddings, Robles, and Anwar testified that they did not believe
14 the men in the maroon car were Sureños, because they did not
15 present themselves the way gang members do, and because the
16 driver (Sanchez) smiled at Giddings. However, Anwar got out
17 of the van, approached the maroon car, and said "No Sureño."
18 When Sanchez did not respond, Anwar threw a punch at
19 Sanchez but missed. Sanchez did not fight back and appeared to
20 not know how to react. Giddings started yelling at Anwar to get
21 back in the van.

22 The three codefendants testified that defendant then started
shooting at the driver of the maroon car. Robles ducked down
onto the floor of the van. Anwar was startled by the gunshots,
moved back and put his hands up near his face. Giddings was
afraid of being caught and yelled at defendant, "What the fuck
you doing? What you doing, doing that shit right here for?"
Giddings began making a U-turn to leave the scene, but
defendant told him to stop and wait for Anwar to get back in the
van. Defendant yelled at Giddings, saying "Stop, stop. Wait for
[Anwar] to get in. Don't fuck up now." By then, defendant had
the gun on his lap pointing in Giddings's direction. Giddings
stopped the van; Anwar got in; and Giddings drove away.

23 Giddings drove the van to defendant's apartment, where the
group stayed for between a half hour and 45 minutes. Defendant
showered and changed his clothes, and Anwar changed his
24 shirt. One or more of the men suggested that defendant urinate
on his hands to remove the gunpowder residue. At the
apartment, Anwar saw the gun that defendant apparently had
25 used.

26 The group left the apartment in Giddings's van. This time,
Robles drove; Giddings sat in the front passenger seat; Anwar
sat in the back seat behind the driver; and defendant sat in the
27 rear, passenger-side seat.
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2. The Arrest

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3 The police had been given a description and license plate
 4 number of the van and were looking for it. Hayward Police
 5 Lieutenant Thomas Perry spotted the van and began following
 6 it, and Robles pulled the van into the parking lot of a pizza
 7 restaurant. Other officers arrived and arrested the four
 8 occupants of the van.

9

10 Stephanie and Kyle Koller arrived at the scene of the arrest and
 11 identified Giddings as the driver of the van at the time of the
 12 shooting and Anwar as the man who was standing in the street
 13 between the van and Sanchez's car.

14

15 Officer Donald Jenkins obtained identifying information from
 16 defendant at the scene. A crowd of spectators had gathered.
 17 Officer Jenkins noticed a group of eight to ten Hispanic males,
 18 two of whom Jenkins recognized as gang members, standing
 19 together and looking at the suspects who were being arrested.
 20 Jenkins pointed out the group to other officers, and the group
 21 then ran behind a building.

22

3. The Search of Defendant's Apartment

23

24 On the day after the shooting, police officers, including
 25 Inspector Robert Coffey, searched defendant's apartment
 26 pursuant to a warrant. A window next to the door of the
 27 apartment had been broken. Clothing and other items were
 28 strewn around the apartment, and there was no bedding on the
 bed. Based on his observations, Inspector Coffey opined that
 someone had broken the window and entered and ransacked the
 apartment. In the apartment police found a box of .22 caliber
 long rifle ammunition, 13 rounds of .38 caliber ammunition,
 and an empty box of Winchester brand 9-millimeter Luger
 ammunition. Police also found several items of red clothing in
 the apartment, the color claimed by Norteño gang members.

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4. Ballistics Evidence

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31 Joseph Fabiny, a firearms expert, testified that he tested the six
 32 shell casings found at the scene of the shooting. The casings
 33 included four Winchester brand 9-millimeter Luger casings, one
 34 Speer brand 9-millimeter Luger casing, and one PMC brand 9-
 35 millimeter Luger casing, all of which had been fired from the
 36 same gun.

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Rodriguez, 2009 WL 2993822, *2-5.

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B. PROCEDURAL HISTORY

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40 Petitioner was tried by a jury in the Alameda County Superior Court. On April 3,
 41 2006, the jury found Petitioner guilty of first degree murder with special circumstances in

1 violation of California Penal Code¹ §§ 187(a), 190.2(a)(21) & 190.2(a)(22); shooting at an
2 occupied motor vehicle in violation of Penal Code § 246; and attempted murder in violation
3 of Penal Code §§ 187(a) & 664. Ex. 1 at 1358-1361. The jury also found true the special
4 circumstances as to count one (first degree murder) and all enhancement allegations
5 relating the aforementioned charges. On August 9, 2006, the court sentenced Petitioner to
6 life in prison without possibility of parole on the first degree murder charge, plus additional
7 consecutive terms on count three and certain of the enhancement allegations. Ex. 1 at
8 1399-1402.

9 On November 26, 2008, the California Court of Appeal affirmed the judgment in a
10 decision certified for partial publication. Ex. 7; People v. Rodriguez, 168 Cal. App. 4th 972
11 (2008), vacated by 202 P.3d 1088 (2009). Petitioner filed a petition for review. Ex. 8. On
12 March 11, 2009, the California Supreme Court granted review and transferred the matter to
13 the California Court of Appeal with directions to vacate its decision and reconsider the
14 matter in light of People v. Avila, 38 Cal.4th 491 (2006). Ex. 9.

15 On September 21, 2009, the California Court of Appeal affirmed the judgment in an
16 unpublished, reasoned decision. Ex. 12.

17 Petitioner filed a petition for rehearing, which was denied on October 13, 2009. Exs.
18 13 & 14. In addition, Petitioner filed a petition for review in the California Supreme Court
19 which was denied on December 2, 2009. Exs. 15 & 16.

20 Thereafter, Petitioner filed the instant Petition for Writ of Habeas Corpus
21 (“Petition”) in this Court. He alleges three due process claims: (1) failure to instruct the
22 jury that three witnesses were accomplices; (2) improper admission of evidence of other
23 crimes; and (3) erroneous admission of certain expert testimony. Respondent has answered
24 the Petition and Petitioner has filed a traverse. The matter is fully briefed and ripe for
25 adjudication.

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27 _____
28 ¹ Unless otherwise noted, all further statutory references are to the California Penal
Code.

1 **II. STANDARD OF REVIEW**

2 The instant Petition is governed by the Antiterrorism and Effective Death Penalty
 3 Act of 1996 (“AEDPA”), 28 U.S.C. § 2254. Under AEDPA, a federal court cannot grant
 4 habeas relief with respect to any claim adjudicated on the merits in a state-court proceeding
 5 unless: (1) the proceeding “resulted in a decision that was contrary to, or involved an
 6 unreasonable application of, clearly established Federal law, as determined by the Supreme
 7 Court of the United States”; or (2) “resulted in a decision that was based on an
 8 unreasonable determination of the facts in light of the evidence presented in the State court
 9 proceeding.” 28 U.S.C. § 2254(d)(1), (2).

10 The first prong of § 2254 applies both to questions of law and to mixed questions of
 11 law and fact. See Williams (Terry) v. Taylor, 529 U.S. 362, 407-409 (2000). A state court
 12 decision is “contrary to” clearly established federal law “if the state court applies a rule that
 13 contradicts the governing law set forth in [Supreme Court] cases or if the state court
 14 confronts a set of facts that are materially indistinguishable from a decision of [the
 15 Supreme] Court and nevertheless arrives at a result different from [its] precedent.” Lockyer
 16 v. Andrade, 538 U.S. 63, 73 (2003) (internal quotation marks omitted). “When there is no
 17 clearly established federal law on an issue, a state court cannot be said to have
 18 unreasonably applied the law as to that issue.” Holley v. Yarborough, 568 F.3d 1091, 1098
 19 (9th Cir. 2009) (citing Carey v. Musladin, 549 U.S. 70, 76-77 (2006)).

20 Relief under the “unreasonable application” clause is appropriate “if the state court
 21 identifies the correct governing legal principle from [the Supreme] Court’s decisions but
 22 unreasonably applies that principle to the facts of the prisoner’s case.” Id. The federal
 23 court on habeas review may not issue the writ “simply because that court concludes in its
 24 independent judgment that the relevant state-court decision applied clearly established
 25 federal law erroneously or incorrectly.” Williams (Terry), 529 U.S. at 411. Rather, the
 26 petitioner must show that the application of Supreme Court law was “objectively
 27 unreasonable.” Id. at 409; Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

1 The second prong of § 2254 applies to decisions based on factual determinations.
 2 See Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Under 28 U.S.C. § 2254(d)(2), a state
 3 court decision “based on a factual determination will not be overturned on factual grounds
 4 unless objectively unreasonable in light of the evidence presented in the state-court
 5 proceeding.” Miller-El, 537 U.S. at 340; see also Torres v. Prunty, 223 F.3d 1103, 1107
 6 (9th Cir. 2000).

7 In determining whether a state court’s decision is contrary to, or involves an
 8 unreasonable application of, clearly established federal law, courts in this Circuit look to
 9 the decision of the highest state court to address the merits of the petitioner’s claim in a
 10 reasoned decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-804 (1991); LaJoie v.
 11 Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). Moreover, “a determination of a factual
 12 issue made by a State court shall be presumed to be correct,” and the petitioner “shall have
 13 the burden of rebutting the presumption of correctness by clear and convincing evidence.”
 14 28 U.S.C. § 2254(e)(1).

15 On federal habeas review, AEDPA “imposes a highly deferential standard for
 16 evaluating state-court rulings” and “demands that state-court decisions be given the benefit
 17 of the doubt.” Renico v. Lett, 559 U.S. 766, 773 (2010) (internal quotation marks omitted).
 18 In applying the above standards on habeas review, this Court reviews the “last reasoned
 19 decision” by the state court. See Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).
 20 The last reasoned decision in this case is the California Court of Appeal’s unpublished
 21 disposition issued on September 29, 2009.

22 **III. DISCUSSION**

23 **A. PRELIMINARY ISSUES**

24 Respondent contends, as an initial matter, that the Petition fails to comport with Rule
 25 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts, 28
 26 U.S.C. foll. § 2254 (“Habeas Rule 2(c)”). Under Habeas Rule 2(c), the petition must state
 27 sufficient facts “that point to a real possibility of constitutional error” along with the
 28 “relationship of the facts to the claim asserted.” Mayle v. Felix, 545 U.S. 644, 655 (2005)

1 (emphasis added). The remedy for a deficiently pled habeas petition is dismissal with leave
 2 to amend. See Blackledge v. Allison, 431 U.S. 63, 74 (1977); Jarvis v. Nelson, 440 F.2d
 3 13, 14 (9th Cir. 1971).

4 In the instant case, each claim of the Petition is set forth in a brief heading, followed
 5 by a lengthy verbatim recitation of background facts from the Court of Appeal's
 6 unpublished decision. Pet. at 3-12.² The Petition, however, makes no effort to demonstrate
 7 the relationship of those facts to each claim. Nor does it present any reasoning, analysis, or
 8 argument demonstrating that the state appellate court's decision is contrary to, or an
 9 unreasonable application of, clearly established Supreme Court law, or was based on an
 10 unreasonable determination of the facts in light of the evidence presented.

11 Tellingly, Petitioner does not respond to Respondent's contention that the Petition
 12 fails to comport with Habeas Rule 2(c). Instead, Petitioner filed a lengthy, nineteen-page
 13 traverse, which, for the first time, presents extensive arguments in support of his claims.
 14 This approach to briefing is wholly inappropriate and prejudicial, as it unfairly deprives
 15 Respondent of the opportunity to respond to arguments that should have been presented in
 16 the petition in the first instance. See Mishler v. Clift, 191 F.3d 998, 1009 n.8 (9th Cir.
 17 1999) (declining to consider even a purely legal argument raised for the first time in a
 18 movant's reply brief, since doing so would prejudice the nonmovants by depriving them of
 19 the opportunity to respond); see also Delgadillo v. Woodford, 527 F.3d 919, 930 n.4 (9th
 20 Cir. 2008) (holding that it is improper to raise new arguments in a traverse). Consequently,
 21 the new arguments presented in Petitioner's traverse are deemed waived and need not be
 22 considered. Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007). That aside, even
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27 ² For instance, the heading for Claim One states: "The court deprived petitioner of
 28 his right to a jury trial and federal due process by refusing to instruct the jury that three
 witnesses were accomplices as a matter of law, and by failing to instruct on the natural and
 probable consequences doctrine." Pet. at 3.

1 considering the traverse on the merits, as will be discussed below, the Court finds no merit
 2 to any of the claims and supporting arguments advanced by Petitioner.³

3 **B. INSTRUCTIONAL ERROR**

4 **1. Background**

5 Petitioner requested that the trial court instruct the jury (pursuant to CALCRIM No.
 6 335) that co-defendants Giddings, Robles, and Anwar, were, as a matter of law,
 7 accomplices whose testimony required corroboration. The court declined this request on
 8 the ground that the question of whether the co-defendants were accomplices was a disputed
 9 factual issue to be resolved by the jury. Instead, the court indicated that it would instruct
 10 the jury on this issue by using CALCRIM No. 334, which explains, in substance, that a
 11 witness is an accomplice to a crime if he personally commits the crime or aids and abets its
 12 commission, i.e., aids in the commission of the crime with knowledge of “the criminal
 13 purpose of the person who committed the crime.”

14 In response, Petitioner asserted that if the trial court were to submit the accomplice
 15 question to the jury, it should also give an instruction explaining the natural and probable
 16 consequences doctrine of aiding and abetting liability.⁴ Petitioner submitted a proposed
 17 instruction (based on CALCRIM No. 402) stating that the three co-defendants had pled
 18 guilty or no contest to assault with a semiautomatic firearm and that if the crimes charged
 19 against defendant were natural and probable consequences of that assault, the three
 20 witnesses should be deemed to be accomplices to the charged crimes. Petitioner further
 21

22 ³ Although the Petition is subject to dismissal for failure to comport with Habeas
 23 Rule 2(c), Respondent did not file a motion to dismiss, but instead answered the Petition on
 24 the merits. Because this matter is now fully briefed and the state court record has been
 25 filed, the Court will reach the merits of the Petition.

26 ⁴ Under the natural and probable consequences doctrine, an aider and abettor is
 27 guilty not only of the intended crime, but also for any other offense that was a natural and
 28 probable consequence of the crime aided and abetted. People v. Chiu, 59 Cal.4th 155, 164-
 65 (2014). This doctrine would have provided Petitioner with an alternative means to
 establish that Giddings, Robles, and Anwar were accomplices. People v. Bryant, — Cal.
 4th —, 2014 WL 4197804, *60 (Cal. Sup. Ct., Aug. 25, 2014).

1 argued that “some natural and probable consequences doctrine instruction” should be given
 2 to the jury as part of the court’s instructions on accomplice testimony. The trial court
 3 declined that request and stated that neither CALCRIM No. 402 nor Petitioner’s modified
 4 version of the instruction was necessary.

5 In a reasoned decision, the state court of appeal considered and rejected Petitioner’s
 6 claim of instructional error. The court held that an instruction stating that the co-defendants
 7 were accomplices as a matter of law was unwarranted given the disputed factual record.
 8 Rodriguez, 2009 WL 2993822, *10. With regard to the failure to instruct on the natural
 9 and probable consequences doctrine, the state appellate court found that the trial court erred
 10 by failing to give the instruction but that the error was harmless. Id.

11 2. Analysis

12 Claims of error in state jury instructions are generally a matter of state law and do
 13 not typically present an issue of constitutional magnitude. Gilmore v. Taylor, 508 U.S.
 14 333, 342-43 (1993); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (“[I]t
 15 must be established not merely that the instruction is undesirable, erroneous or even
 16 ‘universally condemned,’ but that it violated some [constitutional right].”) (internal
 17 quotations omitted). To obtain federal habeas relief based on instructional error, the
 18 petitioner must demonstrate “that an erroneous instruction so infected the entire trial that
 19 the resulting conviction violates due process.” Id. In making its determination, the Court
 20 must evaluate the challenged jury instructions “in the context of the overall charge to the
 21 jury as a component of the entire trial process.” Prantil v. Cal., 843 F.2d 314, 317 (9th Cir.
 22 1988) (quoting Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir. 1984)).

23 Petitioner contends that “the trial court arbitrarily denied [him] his state-created
 24 entitlement to the protection of Penal Code section 1111 by refusing to instruct the jury that
 25 Giddings, Robles and Anwar were accomplices as a matter of law using CALCRIM 335,
 26 and then compounded that denial by refusing to instruct the jury on the natural and
 27 probable consequences doctrine under CALCRIM 402, . . .” Traverse at 8. Penal Code
 28 § 1111 provides that “a defendant cannot be convicted of a crime on the basis of an

1 accomplice's testimony unless that testimony is corroborated by other evidence connecting
 2 the defendant with the commission of the charged offense." Id. An accomplice is defined
 3 as a person "who is liable to prosecution for the identical offense charged against the
 4 defendant on trial . . ." Id. "Whether someone is an accomplice is ordinarily a question of
 5 fact for the jury; only if there is no reasonable dispute as to the facts or the inferences to be
 6 drawn from the facts may a trial court instruct a jury that a witness is an accomplice as a
 7 matter of law." Bryant, — Cal.4th at __, 2014 WL 4197804, *58 (internal quotations and
 8 citation omitted).

9 With regard to the trial court's refusal to give an accomplice as a matter of law
 10 instruction, the state appellate court held that such decision was appropriate in view of the
 11 factual disputes presented. Rodriguez, 2009 WL 2993822, *10. Specifically, the court
 12 found that "[t]here were factual disputes as to whether they aided and abetted the 'identical'
 13 offenses charged against defendant, i.e., the murder of Sanchez, shooting at an occupied
 14 motor vehicle, and the attempted murder of Osvaldo Ramirez." Id. The court also noted
 15 that evidence showing that the co-defendants were present at the scene of the shooting and
 16 failed to prevent it, assisted Petitioner in his efforts to escape, or that they were originally
 17 prosecuted for the same offenses as Petitioner, did "not establish aiding and abetting
 18 liability." Id., *11. Finally, the state appellate court rejected the notion that the co-
 19 defendants were accomplices as a matter of law under the natural and probable
 20 consequences doctrine, finding that "[w]hether a particular criminal act (a nontarget crime)
 21 was a natural and probable consequence of another criminal act (the target crime) is a
 22 factual question to be resolved by the jury." Id., *12.

23 In the instant proceeding, Petitioner has failed to demonstrate that the state appellate
 24 court's determination that the issue of whether the co-defendants were accomplices for
 25 purposes of Penal Code § 1111 was properly submitted to the jury for its determination
 26 justifies relief under § 2254(d). Although Petitioner claims that there was sufficient
 27 evidence to demonstrate that the co-defendants were, in fact, accomplices, Petitioner fails
 28 to show that the evidence was undisputed or amenable to only one inference. See People v.

1 Brown, 31 Cal.4th 518, 556-557 (2003) (“Whether a person is an accomplice within the
 2 meaning of section 1111 presents a factual question for the jury ‘unless the evidence
 3 permits only a single inference.’”) (citation omitted). In any event, this Court is bound by
 4 the state appellate court’s determination regarding the necessity of an instruction.
 5 Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (holding that a state court’s interpretation of
 6 state law, including one announced on direct appeal of the challenged conviction, binds a
 7 federal court on habeas review); e.g., Romero v. Cal. Dept. of Corrections and
 8 Rehabilitation, 405 Fed. Appx. 208, 211, 2010 WL 5030089, *2 (9th Cir. Sept. 3, 2010)
 9 (“The California Court of Appeal’s conclusion that the instructions were adequate as a
 10 matter of state law binds us.”) (citing Bradshaw, 546 U.S. at 76); Gonzalez v. Gonzalez,
 11 394 Fed. Appx. 415, 2010 WL 3468609, *1 (9th Cir. Sept. 3, 2010) (“The California Court
 12 of Appeal’s conclusion that there was no instructional error is a binding interpretation of
 13 state law.”).

14 As to the trial court’s failure to give an instruction on the natural and probable
 15 causes doctrine, the state appellate court held that this was erroneous because the
 16 prosecution relied on the testimony of potential accomplices to prove Petitioner’s guilt.
 17 Rodriguez, 2009 WL 2993822, *13. However, the state appellate court explained that
 18 under California law, a failure to instruct on accomplice testimony is harmless if there is
 19 sufficient corroborating evidence in the record. Id. *14 (citing People v. Frye, 18 Cal.4th
 20 894, 966 (1998) and People v. Miranda, 44 Cal.3d 57, 100 (1987), disapproved on another
 21 point in People v. Marshall, 50 Cal.3d 907, 933, n.4 (1990)). After extensively discussing
 22 the corroborating testimony presented at trial, the state appellate court concluded that “there
 23 is sufficient corroborating evidence connecting defendant with commission of the charged
 24 crimes.” Id., *15.

25 Petitioner argues that the trial court’s failure to give a natural and probable causes
 26 instruction deprived him of his rights under Penal Code § 1111 and was prejudicial because
 27 the only substantial evidence identifying him as the shooter was provided by the co-
 28 defendants, who allegedly had a motive to lie in order to avoid criminal liability. Traverse

1 at 8. The Ninth Circuit has held that “[a]s a state statutory rule, and to the extent that the
 2 uncorroborated testimony is not ‘incredible or insubstantial on its face,’ the rule [of
 3 California Penal Code § 1111] is not required by the Constitution or federal law.” Laboa v.
 4 Calderon, 224 F.3d 972, 979 (9th Cir. 2000); accord In re Mitchell P., 22 Cal.3d 946, 949
 5 (1978) (stating that § 1111’s corroboration requirement is an independent state law that is
 6 “not constitutionally based.”); Redding v. Minn., 881 F.2d 575, 578 (8th Cir. 1989)
 7 (holding that a corroboration requirement “is a matter of state law which does not implicate
 8 a constitutional right cognizable on habeas review”). Petitioner has made no showing that
 9 the co-defendants’ testimony was facially incredible or unsubstantial. As a result,
 10 Petitioner has not presented a claim of constitutional magnitude. See United States v.
 11 Lopez, 803 F.2d 969, 973 (9th Cir. 1986) (“The uncorroborated testimony of an accomplice
 12 is enough to sustain a conviction unless the testimony is incredible or unsubstantial on its
 13 face.”).

14 The above notwithstanding, the state appellate court correctly found that the
 15 prosecution had presented sufficient corroborating evidence at trial, consistent with Penal
 16 Code § 1111. Several independent witnesses testified that the van driven by co-defendant
 17 Giddings was at the scene of the shootings, and one eyewitness in particular testified that
 18 the shots were fired by the person sitting in the front passenger seat of the van driven by
 19 Giddings. Evidence was presented that the surviving victim, Ramirez, identified Petitioner
 20 as one of the individuals present in the van. A search of Petitioner’s apartment uncovered
 21 an empty box of Winchester brand 9 millimeter Luger ammunition, and four Winchester
 22 brand 9-millimeter casings, all fired from the same gun. Petitioner argues that this evidence
 23 is insufficient to corroborate the testimony of his co-defendants. Traverse at 8. However,
 24 corroborative evidence “need not corroborate every fact to which the accomplice testified
 25 or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the
 26 crime in such a way as to satisfy the jury that the accomplice is telling the truth.” Laboa,
 27 224 F.3d at 979 (emphasis added, citation omitted). The Court finds that the corroborative
 28 evidence presented at trial connected Petitioner to the shootings. See Alcantara v. Rackley,

1 554 Fed. Appx. 674, 674-75 (9th Cir. May 14, 2014) (finding that accomplice testimony
 2 was adequately corroborated by circumstantial evidence of defendant's involvement in the
 3 murder); United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (holding that
 4 testimony that the defendant was present in the room where a cooler with the cash was
 5 found and that a "moneyman" would be present at the drug deal was sufficient to
 6 corroborate an accomplice's testimony).

7 The Court concludes that the trial court's failure to give the accomplice instructions
 8 requested by Petitioner did not deprive him of his right to a fundamentally fair trial. See
 9 Estelle, 502 U.S. at 72-73. Nor did it have a substantial and injurious effect or influence in
 10 determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 638 (1993); Pulido v.
 11 Chrones, 629 F.3d 1007, 1012 (2010). Accordingly, the Court DENIES relief on Claim
 12 One.

13 **C. ADMISSION OF PRIOR ACT EVIDENCE**

14 **1. Background**

15 Co-defendants Giddings and Robles testified that a few days before the murder of
 16 Sanchez, they and Petitioner were driving in the Meekland neighborhood of Hayward when
 17 they saw a Hispanic man wearing blue clothing walking down the street. Rodriguez, 2009
 18 WL 2993822, *5. Petitioner believed the man was a Sureño gang member. Id. Giddings
 19 made a U-turn and drove up next to the man, and defendant fired shots at him.

20 Prior to trial, Petitioner unsuccessfully made a motion in limine to exclude evidence
 21 of the Meekland shooting. Id. Relying on California Evidence Code § 1101(b), the trial
 22 court ruled that evidence of the shooting was admissible for the limited purposes of proving
 23 Petitioner's motive, intent, and premeditation and deliberation in connection with the
 24 Mission shooting, including proving that the defendant committed the Mission shooting for
 25 the benefit of a criminal street gang, as alleged in the special circumstance and sentence

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1 enhancement allegations. Id.⁵ After the close of evidence, the trial court read a limiting
 2 instruction to the jury that it could only consider evidence of the Meekland shooting for
 3 purposes of determining whether Petitioner had the requisite intent, a motive, or a plan or
 4 scheme in connection with the Mission shooting. Id.

5 On appeal, Petitioner alleged that the admission of evidence of the Meekland
 6 shooting constituted reversible error. In rejecting this claim, the state appellate court noted
 7 that the admissibility of evidence of other crimes depend on (1) the materiality of the facts
 8 sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and
 9 (3) the existence of any rule or policy requiring exclusion of the evidence. Id., *6. The
 10 court analyzed these factors as follows:

11 Applying the three factors listed above, the trial court did not
 12 abuse its discretion in admitting evidence about the Meekland
 13 shooting. First, the facts that the evidence was admitted to
 14 prove, i.e., defendant's motive, intent, and premeditation or
 15 plan in connection with the Mission shooting, were material
 16 issues in the case. . . . The information charged, and the
 17 prosecution had to prove, that defendant intended to kill
 18 Sanchez and Ramirez, that the shooting was willful, deliberate
 19 and premeditated, and that defendant carried out the crimes for
 20 the benefit of a criminal street gang and with the specific intent
 21 to promote the activities of the gang.

17 * * *

18 As to the second factor governing admissibility of other crimes
 19 evidence, testimony about the Meekland shooting was probative
 20 of defendant's motive, intent, and premeditation or plan in
 21 connection with the Mission shooting. . . . Here, the Meekland
 22 and Mission shootings were very similar. In both instances,
 23 defendant was driving around with fellow Norteño gang
 24 members, saw people that he perceived to be Sureño gang
 25 members, and shot at them. Evidence of the Meekland shooting
 26 thus tended to prove that defendant's shooting of Sanchez and
 27 Ramirez was intentional and premeditated, rather than
 28 accidental or random.

24 * * *

25 ⁵ Evidence Code § 1101(b) states: “Nothing in this section prohibits the admission
 26 of evidence that a person committed a crime, civil wrong, or other act when relevant to
 27 prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity,
 28 absence of mistake or accident, or whether a defendant in a prosecution for an unlawful
 sexual act or attempted unlawful sexual act did not reasonably and in good faith believe
 that the victim consented) other than his or her disposition to commit such an act.”

1 The third factor governing the admissibility of other crimes
 2 evidence is whether the evidence should be excluded pursuant
 3 to an exclusionary rule such as Evidence Code section 352. . .

4 The trial court here did not abuse its discretion in declining to
 5 exclude evidence of the Meekland shooting under Evidence
 6 Code section 352. Although evidence of other crimes always
 7 poses some risk of prejudice . . . , the risk of prejudice was not
 8 unusually grave here. The Meekland evidence was no more
 9 inflammatory than the evidence about the charged crimes, so it
 10 was unlikely that the Meekland evidence inflamed the jury's
 11 passions or led the jury to convict defendant based on that
 12 evidence. . . . The testimony about the Meekland shooting did
 13 not consume very much time or dominate the trial testimony. It
 14 was confined to a short series of questions to Giddings and
 15 Robles. The trial court instructed the jury on the limited
 16 purposes for which it could consider the evidence of the
 17 Meekland shooting, which reduced the risk of prejudice. . . .

18 Rodriguez, 2009 WL 2993822, *6-8.

19 **2. Analysis**

20 Petitioner claims that “[t]he court deprived [him] of his federal right to due process
 21 by admitting evidence of other crimes even though there were no permissible inferences the
 22 jury might draw from the evidence.” Pet. at 10. This claim lacks merit. A claim based on
 23 the admission of allegedly prejudicial evidence does not present a violation of clearly
 24 established federal law as required for habeas relief under AEDPA. Holley, 568 F.3d at
 25 1101 (finding that the Supreme Court has not yet clearly ruled that the admission of
 26 irrelevant or overtly prejudicial evidence constitutes a due process violation). Absent
 27 “clearly established federal law,” a federal court evaluating a habeas claim cannot conclude
 28 that a state court’s admission of evidence was contrary to, or unreasonably applied,
 29 Supreme Court precedent. Wright v. Van Patten, 552 U.S. 120, 126 (2008). That aside, the
 30 state appellate court’s determination that evidence relating to the Meekland shooting was
 31 admissible under state law; i.e., California Evidence Code § 1101(b), is binding in a federal
 32 habeas action. Bradshaw, 546 U.S. at 76; Hicks v. Feiock, 485 U.S. 624, 629 (1988)
 33 (holding that a determination of state law made by an intermediate appellate court must be
 34 followed).

1 The Court further finds that the admission of evidence relating to the Meekland
 2 shooting did not deprive Petitioner of his right to a fair trial. Habeas relief is only available
 3 if the error had a “substantial and injurious effect or influence in determining the jury’s
 4 verdict” and resulted in “actual prejudice.” Brecht, 507 U.S. at 637. At trial, significant
 5 evidence of Petitioner’s guilt was presented. See discussion, *supra*. Importantly, the jury
 6 was instructed that it could consider evidence of uncharged conduct solely for the purpose
 7 of determining the Petitioner’s intent, motive or plan. Ex. 1 at 1306-1307; Ex. 2 at 2531.
 8 Juries are presumed to follow their instructions. Weeks v. Angelone, 528 U.S. 225, 234
 9 (2000). In light of the evidence of guilt and limiting instructions given, any error in
 10 admitting evidence of the Meekland shooting could not have had a substantial and injurious
 11 effect on the jury’s verdict.

12 The Court concludes that Petitioner has failed to state any basis for habeas relief
 13 based on the erroneous admission of evidence, and therefore, DENIES relief on Claim
 14 Two.

15 **D. ADMISSION OF EXPERT TESTIMONY**

16 **1. Background**

17 At trial, Hayward Police Inspector John Lage (“Inspector Lage”) testified as an
 18 expert on criminal street gangs; in particular, the Hispanic Norteño and Sureño gangs active
 19 in southern Alameda County. Rodriguez, 2009 WL 2993822, *15. Inspector Lage opined
 20 that, at the time of the incident, Petitioner was an active member in a subset of the Norteño
 21 gang, known as the South Side Hayward/DGF gang. Id. He based this opinion on
 22 information gleaned from the case and other sources, including Petitioner’s admissions and
 23 criminal record and information received from other police officers, school officials, and
 24 gang members. Id. Inspector Lage also opined that Giddings, Robles, and Anwar were
 25 active gang members on the date of the incident, and that Petitioner had previously
 26 associated with Giddings and Robles. Id.

27 Inspector Lage testified that Norteño gang members view Sureño gang members,
 28 whom they derogatorily refer to as “scrap,” as enemies and actively seek them out. Id. In

1 response to hypothetical questions based on the facts of the attack on Sanchez and Ramirez,
 2 Inspector Lage responded that the crime: (1) was committed for the benefit of, at the
 3 direction of, or in association with members of the South Side Hayward/DGF gang and
 4 with the specific intent to promote, further, or assist in criminal conduct by members of the
 5 gang; and (2) was carried out to further the activities of the gang. Id. He did not testify
 6 regarding Petitioner's specific intent to commit the crimes. Id.

7 On appeal, Petitioner argued that the trial court erred in allowing Inspector Lage to
 8 testify as to an ultimate issue, i.e., that Petitioner's motives for committing the offense was
 9 related to his gang affiliation. Id., *17. The state appellate court rejected this contention,
 10 noting that “[e]xpert opinion testimony about criminal street gangs that is otherwise
 11 admissible is not made inadmissible because it encompasses the ultimate issues in the case”
 12 and that “courts have frequently permitted expert testimony about whether there was a
 13 gang-related motive for a particular crime.” Id. (citing cases). Citing People v. Killebrew,
 14 103 Cal. App. 4th 644, 657 (2002), the court noted that the only limitation on an expert's
 15 gang testimony is that he may not testify that an individual had specific knowledge or
 16 possessed a specific intent. Id. The court found that Inspector Lage's testimony did not
 17 contravene that limitation, as he merely testified “in response to hypothetical questions
 18 based on the facts of this case.” Id.

19 The state appellate court also rejected Petitioner's contention that the trial court
 20 erred in permitting Inspector Lage to testify about certain hearsay statements and other
 21 matters he considered in forming his opinions. Id. The court summarized the disputed
 22 testimony as follows:

23 Defendant identifies five portions of Inspector Lage's testimony
 24 that he claims were improperly admitted, four of which relate to
 25 information that Inspector Lage described when testifying about
 26 the bases for his opinion that defendant was an active DGF
 27 gang member on September 16, 2003. Inspector Lage testified
 28 that his opinion on this issue was based, among many other
 things, on the following: (1) an Officer Stanley told Lage that in
 2000 defendant was with a known DGF gang member at a
 liquor store frequented by gang members and admitted to
 Stanley that he hung out with the gang member; (2) an Officer
 Snell told Lage that on May 1, 2003 he stopped defendant and
 Anwar in an area frequented by gang members and concluded

1 that both defendant and Anwar were gang-affiliated;
 2 (3) Margaret McCullum, a school administrator at Tennyson
 3 High School, told Lage that defendant was affiliated with the
 4 South Side Hayward gang at the school; (4) in January 2006,
 5 defendant was involved in a gang-related fight at Santa Rita jail,
 6 which Lage learned about through an investigation that
 7 included speaking to witnesses and participants and reading
 8 reports prepared by sheriff's deputies. The fifth portion of
 9 testimony that defendant challenges as improper hearsay relates
 10 to Inspector Lage's testimony that when a gang member is
 11 arrested for a serious crime, fellow gang members frequently
 12 seek to help the arrested gang member avoid prosecution by
 13 destroying or concealing evidence. Inspector Lage testified that
 14 this opinion was based on his own investigations of gang-
 15 related crimes, as well as the statements of gang members and
 16 other police officers.

17 Rodriguez, 2009 WL 2993882, *19.

18 Petitioner argued that permitting Inspector Lage to testify regarding hearsay
 19 statements was improper and violated his rights under the federal Confrontation Clause.
 20 The state court of appeal rejected this claim, finding that “[a]n expert witness may offer
 21 opinion testimony based on material that is not otherwise admissible, including hearsay, as
 22 long as the material is of a type that is reasonably relied upon by experts in the particular
 23 field in forming their opinions.” Id. Nevertheless, to ensure that the jury did not construe
 24 the hearsay statements as evidence, the trial court instructed the jury categorically that all
 25 statements recounted by Inspector Lage as bases for his opinions could be considered only
 26 to evaluate Lage’s opinions and could not be considered for the truth of the information in
 27 the underlying statements. Id. The appellate panel concluded “that this instruction at the
 28 end of the trial was sufficient to guide the jurors as to the proper uses of the evidence.” Id.⁶

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1 With respect to Petitioner's ancillary Confrontation Clause claim, the state court of
 2 appeal held that he waived such argument by failing to interpose an objection on that
 3 ground during trial. In the alternative, the court found that even if the claim were not
 4 waived, "an expert's description of the material upon which his or her opinions are based,
 5 including hearsay statements, does not violate the confrontation clause because it is offered
 6 not for the truth of the underlying statements but to enable the jury to assess the bases for
 7 the expert's opinion." Id.

8 **2. Analysis**

9 *a) Testimony Relating to Ultimate Issues*

10 Petitioner alleges that "the court deprived [him] of his right to federal due process
 11 and his right to confront by allowing an expert to rely on unreliable hearsay testimony on
 12 the ultimate issues in the case, including whether motives for crimes were gang-related."
 13 Pet. at 11. This claim lacks merit. As an initial matter, Petitioner cannot establish that the
 14 state appellate court's decision is contrary to or is an unreasonable application of clearly
 15 established Supreme Court law. See Briceno v. Scribner, 555 F.3d 1069, 1077-78 (9th Cir.
 16 2009) (rejecting habeas claim that expert testimony regarding gang-related nature of crimes
 17 unconstitutionally pertained to ultimate issue for jury, because "there is no clearly
 18 established constitutional right to be free of an expert opinion on an ultimate issue").
 19 Moreover, the Ninth Circuit has consistently held that allowing an expert to provide gang-
 20 related testimony does not offend due process. Moses v. Payne, 555 F.3d 742, 761 (9th
 21 Cir. 2009) (rejecting the suggestion that "the Constitution is violated by the admission of
 22 expert testimony concerning an ultimate issue to be resolved by the trier of fact.");
 23 Windham v. Merkle, 163 F.3d 1092, 1103-104 (9th Cir. 1998) (finding no due process
 24 violation in admission of "gang expert" testimony which was relevant to prosecution theory
 25 of petitioner's motive for presence and participation in crimes which led to murder by
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1 accomplice).⁷ While it is true than an expert cannot testify about a defendant's personal
 2 motive underlying his criminal conduct, the state appellate court found that Inspector Lage
 3 did not offer any such testimony, and permissibly responded to hypothetical questions. As
 4 noted, this Court is bound by that determination. See Bradshaw, 546 U.S. at 76.

5 **b) *Reliance on Hearsay***

6 Nor is there any merit to Petitioner's ancillary claim that it was improper for the trial
 7 court to allow Inspector Lage to testify regarding the hearsay statements he relied upon as
 8 the basis for certain of his opinions. "California law permits gang experts to rely on
 9 reliable hearsay evidence to form an opinion, even if the evidence would otherwise be
 10 inadmissible." People v. Valadez, 220 Cal. App. 4th 16, 29 (2013). "Expert testimony is
 11 admissible to establish the existence, composition, culture, habits, and activities of street
 12 gangs; a defendant's membership in a gang; gang rivalries; the 'motivation for a particular
 13 crime, generally retaliation or intimidation'; and 'whether and how a crime was committed
 14 to benefit or promote a gang.'" People v. Hill, 191 Cal. App. 4th 1104, 1120 (2011)
 15 (citation omitted). The same is true under federal law. See United States v. Hankey, 203
 16 F.3d 1160, 1168-70 (9th Cir. 2000) (holding that gang expert could rely on his law
 17 enforcement experience investigating gangs and "street intelligence" in forming his
 18 "opinions about gang membership and tenets"); see also Fed. R. Evid. 703; United States v.
 19 McCollum, 732 F.2d 1419, 1422-23 (9th Cir. 1984) (applying Rule 703 to affirm the
 20 admission of expert testimony based on hearsay).

21 The state court of appeal held that it was permissible under state law for Inspector
 22 Lage to rely on hearsay evidence in forming his opinions. Rodriguez, 2009 WL 2993822,
 23 *6-8. A state court's interpretation of state law is binding on federal habeas review. Hicks,
 24 485 U.S. at 629-30 n.3. In addition, the Court notes that the trial court, while initially
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26 ⁷ Likewise, under state law, the fact that an expert's testimony may have touched
 27 upon an ultimate issue in the case, including defendant's motive, does not violate due
 28 process. See People v. Valdez, 58 Cal. App. 4th 494, 508-509 (1997) (finding trial court
 properly admitted expert witness' opinion that individual participants in gang-related
 shooting acted for the benefit of a gang).

1 rejecting Petitioner’s trial counsel’s request for a limiting instruction, later instructed the
2 jury that all statements recounted by Inspector Lage as bases for his opinions could be
3 considered only to evaluate his opinions and could not be considered for the truth of the
4 information in the underlying statements. A habeas court “must presume that the jury
5 followed its instructions” Boyde v. Brown, 404 F.3d 1159, 1173 (9th Cir. 2005).
6 Thus, even if the trial court committed constitutional error in allowing Lage to testify
7 regarding the hearsay testimony he relied upon in forming his opinions, the recitation of
8 any hearsay statements was harmless. See Pulido, 629 F.3d at 1012.

c) ***Confrontation Clause***

Finally, the Court finds that Petitioner’s related Confrontation Clause claim is procedurally barred and otherwise fails on the merits. The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const., 6th Amend. Here, the state appellate court found that Petitioner waived any Confrontation Clause claim on the ground that his trial counsel failed to make a contemporaneous objection to the disputed evidence.⁸ In a federal habeas proceeding, a habeas petitioner’s failure to comply with a state’s contemporaneous objection rule results in a procedural default that bars federal consideration of the claim, unless the petitioner demonstrates both “cause” for his failure to raise the objection at trial and actual “prejudice” accruing from the error. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); Cook v. Schriro, 538 F.3d 1000, 1025-26 (9th Cir. 2008) (absent a showing of cause and prejudice, petitioner is barred from raising a claim on federal habeas review where he failed to meet state’s contemporaneous objection rule).

23 In order to show “cause” for a procedural default, Petitioner must show “that some
24 objective factor external to the defense impeded counsel’s efforts to comply with the
25 State’s procedural rule.” Murray v. Carrier, 477 U.S. 478, 488 (1986). In neither his

26 ⁸ Petitioner concedes defense counsel's failure to make a contemporaneous objection
27 on Confrontation Clause grounds, but asserts that her request for a limiting instruction
28 regarding Inspector Lage's hearsay statements was tantamount to such an objection.
Traverse at 15. Petitioner cites no authority for that proposition.

1 Petition nor traverse does Petitioner identify any such objective factor. Rather, Petitioner
 2 summarily asserts it is “not clear” that the state appellate court decision rests upon a state
 3 law procedural bar. Traverse at 15. The Court disagrees. The state appellate court
 4 expressly relied on California Evidence Code § 353. See Rodriguez, 2009 WL 2993822,
 5 *20 (“Defendant did not expressly object on confrontation grounds prior to or at trial, so
 6 this argument is waived.”) (citing Cal. Evid. Code § 353(a)). Section 353 is California’s
 7 contemporaneous objection rule. See Melendez v. Pliler, 288 F.3d 1120, 1125 (9th Cir.
 8 2002). Having failed to otherwise show cause or prejudice, the Court finds that Petitioner’s
 9 claim that his rights under the Confrontation Clause were violated is procedurally barred.

10 Even assuming the claim is not defaulted, it fails on its merits. The Confrontation
 11 Clause does not bar the use of testimonial statements for purposes other than establishing
 12 the truth of the matter asserted. Williams v. Illinois, —U.S. —, 132 S.Ct. 2221, 2228
 13 (2012). The Williams court explained that:

14 When an expert testifies for the prosecution in a criminal case,
 15 the defendant has the opportunity to cross-examine the expert
 16 about any statements that are offered for their truth. Out-of-
court statements that are related by the expert solely for the
purpose of explaining the assumptions on which that opinion
rests are not offered for their truth and thus fall outside the
 17 scope of the Confrontation Clause.

18 Id. (emphasis added). Numerous federal courts have thus found that a gang expert’s
 19 reliance on hearsay evidence does not violate the Confrontation Clause where, as here, the
 20 underlying hearsay is not admitted for the truth of the matter asserted, but rather to support
 21 the gang expert’s opinion. See Martin v. Lewis, No. 2:12-cv-1384 KJM DAD P2013 WL
 22 3786863, *11 (E.D. Cal., Jul. 18, 2013) (listing cases). Additionally, the fact that Inspector
 23 Lage testified and was available for cross-examination further undermines Petitioner’s
 24 claim. See United States v. Beltran-Rios, 878 F.2d 1208, 1213 & n.3 (9th Cir. 1989)
 25 (holding that expert’s drug courier profile testimony, which was based in part upon
 26 information obtained from DEA officials, did not violate the confrontation clause,
 27 particularly where the expert witness was available for cross-examination). Accordingly,
 28 the Court DENIES relief on Claim Three.

1 **E. CERTIFICATE OF APPEALABILITY**

2 The federal rules governing habeas cases require a district court that denies a habeas
3 petition to grant or deny a certificate of appealability (“COA”) in its ruling. See Rule 11(a),
4 Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. The Court declines to issue a COA
5 in this case, as Petitioner has not demonstrated that “jurists of reason would find it
6 debatable whether the petition states a valid claim of the denial of a constitutional right and
7 that jurists of reason would find it debatable whether the district court was correct in its
8 procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

9 **IV. CONCLUSION**

10 For the reasons stated above,

11 IT IS HEREBY ORDERED THAT:

12 1. The Petition for Writ of Habeas Corpus is DENIED.
13 2. The Court declines to issue a COA.
14 3. The Clerk shall close the file and terminate any pending matters.

15 IT IS SO ORDERED.

16 Dated: September 30, 2014


SAUNDRA BROWN ARMSTRONG
United States District Judge

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